Montana State Legislature

Exhibit Number: 5

This exhibit is in regards to SB 202 , It contains several different types of materials to numerous to scan. Therefore only 10 pages have been scanned to aid in your research. You may view the original it is on file at the Montana Historical Society and may be observed there.

EXHIBIT 5
DATE 4-10-07
SB 202

Carnegie Corporation of New York

CARNEGIE Reporter

Vol. 3/No. 4
Spring 2006

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Eurasia: A New World Order?

Judicial Elections: Still Fair and Balanced?

A Developing Identity: Hispanics in the United States

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Judicial Elections

STILL FAIR AND BALANCED?

by Robert Rackleff

Are money and special interests tipping the balance in the process of electing judges?

Indicted for election law violations in 2005, then-Republican U.S. House Majority Leader Tom DeLay charged that the presiding Texas judge, a Democrat, was biased against him and had him removed from the case. The prosecutor, in turn, had the next two proposed judges, both Republicans, removed for alleged partisan bias in favor of DeLay. q Competing for an open seat in the 2004 election for District 5 of the Illinois Supreme Court—representing the state's 37 southernmost counties—the Republican and Democratic candidates spent a combined $9.3 million, over $16 per vote cast. The District includes Madison County, called by tort reform groups the nation's "number one judicial hellhole" for its many court rulings that favor plaintiffs in nationwide class action suits. q With several cases involving his coal companies before the West Virginia Supreme Court, Don L. Blankenship contributed $2.45 million to defeat incumbent Justice Warren McGraw, a Democrat, in 2004 and elect Republican Brent Benjamin. Blankenship was before the court the next year to appeal the state's order to shut down a polluting waste pond owned by one of his companies. Later, Blankenship vowed in a speech to target Justice Larry Starcher for defeat in 2008, accusing him of bias against him.

Money and Partisanship

Republican judges? Democratic judges? Multimillion-dollar state Supreme Court justice campaigns? Corporations with cases before a court spending millions to oust judges who have ruled against them? Questions like these puzzle many Americans accustomed to a judicial system touted worldwide for its independence and fairness.

There are more than 30,000 judges in the 50 states, including over 1,300 appellate judges, 11,000 trial judges, and nearly 18,000 limited-jurisdiction judges, such as family court or municipal court judges, according to the American Judicature Society.

Some form of popular elections for judges takes place in 28 states and 87 percent of all state and local judges must face voters at regular intervals in some

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type of election. It is a decades-old system that the public believes gives them a voice in who presides over the state and local courts that can directly affect their lives. It is also uniquely American; almost no other nation has popular elections to choose judges.

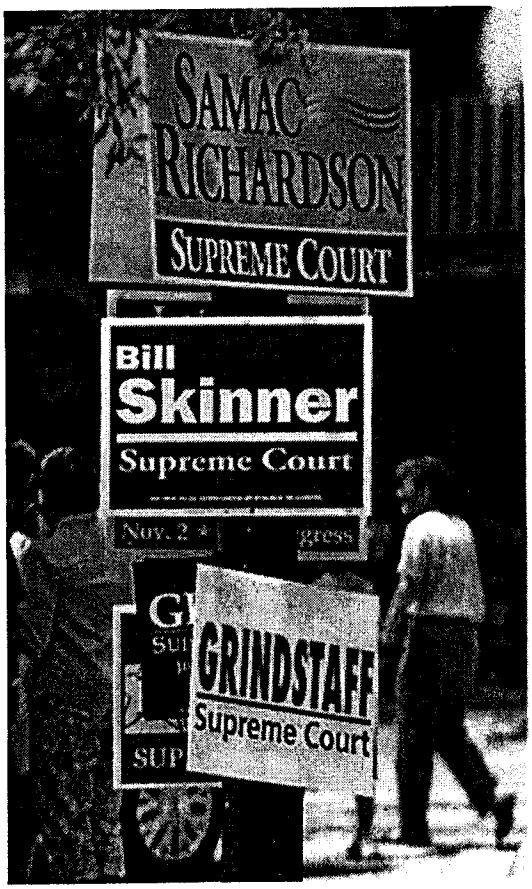

Photo by Associated Press, AP

A "political totem pole" at the Neshoba County Fair in Philadelpdia, Mississippi, displaying campaign posters for candidates competing in the 2004 elections for state Supreme Court.

For a long time, this seemed fine, as long as judicial elections were mostly tame, with many judges elected or re-elected with little or no opposition or rancor. Contested elections required only relatively modest campaign budgets. The campaign rhetoric was usually low-key. In fact, until 2002, judicial candidates in many states could be subjected to disciplinary action if they announced positions about issues coming before the courts, criticized their opponents or even exaggerated their own qualifications.

That has changed dramatically in recent years in ways that alarm many observers of America's legal system.

The 2004 elections marked a "tipping point" for state Supreme Court campaigns, the nonprofit Justice at Stake Campaign—which has received support for its work from Carnegie Corporation of New York—stated in its report, *The New Politics of Judicial Elections 2004.* Total spending soared to an estimated $123 million in the past three elections cycles, nearly twice the $73 million spent in the previous three cycles, according to the report.

"A perfect storm of hardball TV ads, millions in campaign contributions and bare-knuckled special interest politics is descending on a growing number of Supreme Court campaigns," the report stated. "The stakes involve northing less than the fairness, impartiality and independence of courts in the 38 states that elect their high court judges."

As a result, America's state and local courts are facing a new challenge of credibility and public trust as campaign spending and contributions to judicial candidates have seemingly spun out of control across the nation.

A look to the future is not encouraging. According to the report, 17 states will have contested Supreme Court elections in 2006—and more than one seat on the ballot in 14 of them—creating "an irresistible temptation for interest groups seeking to pack the court." In Kentucky alone, 261 of the state's 266 elected judges will be on that ballot.

The situation has prompted reformers in state legislatures and legal organizations to rethink the current system and to propose changes to reduce the role of money and political parties in the politics of selecting state and local judges. "Clearly there's a trend toward more money and more acrimony in judicial races, and more judges taking sides on hot-button issues," said Charles Geyh, law professor at Indiana University.

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Electing Judges: The Intention Was Reform

The revolving judges in the Tom DeLay case directed a spotlight on the problem of partisan involvement in judicial elections. The first Texas judge selected to try his case, Judge Bob Perkins, had a documented record of partisan involvement. He had made 30 reported contributions in recent years totaling $5,255 to Democratic candidates and organizations, including $200 to MoveOn.org. The senior judge decided that was enough to remove Perkins from the case.

Next chosen, Republican Judge B. B. Schraub, also had a record of contri-butions totaling $5,600 to several Republican candidates, and he removed himself. His successor, Texas Supreme Court Chief Justice Wallace Jefferson, removed himself too. Jefferson had the same campaign treasurer and fundraiser as DeLay's Texans for a Republican Majority Political Action Committee and had accepted large donations from organizations named in the indictment.

This "judicial carousel," as the *Austin American-Statesman* called it, ended when both sides settled for a semi-retired San Antonio district judge, who seemed reasonably unbiased. He is a Democrat who had contributed only $150 each to three Democrats in recent years. "That's it, I'm a tightwad," Judge Pat Priest stated.

Despite the recent notoriety, there is little new about judicial elections. In fact, they were considered reforms in pre-Civil War America. The first 29 states to enter the union adopted the federal model of appointed judges, following English law and the belief of the framers of the Constitution that this would ensure an impartial and independent judiciary. In the *Federalist Papers,* Alexander Hamilton, James Madison and John Jay argued that elected judges would succumb to popular whims and not follow the requirements of the law.

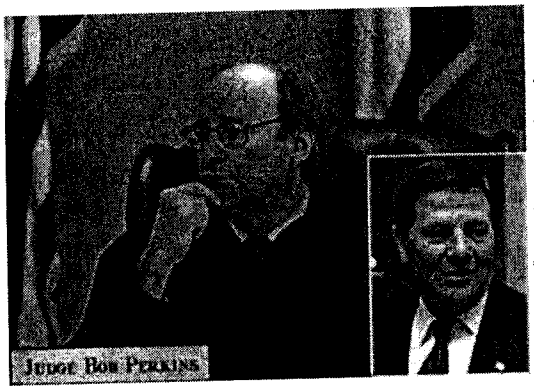

Photo by Getty Images; inset by Associated Press, AP

Above: Judge Bob Perkins
Inset: Congressman Tom Delay (R-TX)

However, the movement to democratize politics and society that propelled Andrew Jackson into the presidency in 1828 helped to spread the idea of elected judges to the states, beginning with New York's adoption of partisan elected judges in 1846. It received broad support, based on the concern that appointed judges were unaccountable to the wishes of the public, in keeping with the growing popular dislike of elites of all sorts. By 1860, most states—and every new state admitted to the union by then—had adopted such a system.

Neither is there much new about criticism of this system. "Putting courts into politics and

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compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench," Roscoe Pound told the American Bar Association (ABA) in 1906 when he was a Nebraska law professor.

Reforms advocated by the ABA since then moved many states toward some form of appointment of judges, or merit selection, combined with elections, particularly retention elections after initial appointment. This resulted in a patchwork of systems that combine appointment, usually by governors, and popular election.

As summarized by the American Bar Association, six states have partisan elections for Supreme Court justices, and two more have nonpartisan elections but parties are involved in nominating and endorsing candidates. Another thirteen have nonpartisan elections, but parties often support candidates directly; seventeen have uncontested retention elections, and twelve grant life tenure or reappointment.

The selection system varies even more for lower state court judges.

Of the thirty-nine states with intermediate appellate courts, five have partisan elections, twelve have nonpartisan elections, fourteen have uncontested retention elections after initial appointment and eight grant life tenure or use reappointment of some type for their intermediate appellate courts. The breakdown is similar for selection systems for trial courts of general jurisdiction (see sidebar).

Even all this does not accurately describe how judges get selected. For example, "It has become common in many states for judges to retire before the end of a term, which provides the governor with an opportunity to make an interim appointment," the American Judicature Society (AJS) reported. Its recent survey in 11 states with elected judges found that more than half of them first took office by appointment because of this common practice. "The selection of judges in states requiring election is thus not simply a pure electoral process, just as merit selection systems are not a purely appointive process," the AJS concluded.

Perhaps the greatest irony about public support for electing judges—hovering around 80 percent by many surveys—is that the public knows little about the judicial candidates they insist on electing. Only 13 percent of Americans reported in 2001 that they knew enough to vote in a judicial election, according to a national survey conducted for the Justice at Stake Campaign.

Partly to blame are long ballots with numerous contests for judicial seats in many elections. For example, in Cook County, Illinois, the 2004 ballot featured 84 trial court judge candidates. On such ballots, one analysis of judicial retention races showed, 30 percent of those who voted at the top of the ticket failed to vote at the bottom for judges up for retention, a phenomenon called "roll off."

As one Texas newspaper columnist put it, "In most large urban counties, and most appellate courts, most voters wouldn't know their judges if they came up and bit them." Judicial candidates with "nice" names such as Johnson tend to do well, another observer pointed out. Conversely, candidates on the wrong side of popular resentment over unrelated issues can fare poorly.

For example, Pennsylvania Supreme Court Justice Russell Nigro in 2004 became the first high court judge to lose a retention election ever in that state, apparently because of public anger over a questionable pay raise that state legislators had voted for themselves. Nigro and Justice Sandra Schultz Newman were the only statewide officials on that November ballot—and thus took the brunt of that anger. Newman won retention, but only with 54 percent of the vote.

The paradox of public insistence on electing judges but lack of awareness of judicial candidates is the result of what law professor Charles Gardner Geyh of Indiana University calls the political reality of the "Axiom of 80." He asserts that some 80 percent of the public support electing judges, that some 80 percent do not vote in judicial elections, that some 80 percent cannot identify the candidates for judge, and that some 80 percent believe that elected judges are influenced by campaign contributions. (Professor Geyh emphasizes that his percentages are approximate.)

Next page: Political parties in many states have long been involved in selecting judges, either appointed or elected.

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The Influence of Special Interests

Political parties in many states have long been involved in selecting judges, either appointed or elected. "When I started practicing law in Chicago [in 1952]," recalled Abner Mikva, longtime Congressman and federal appellate judge, "it was a patronage operation. [Y]ou became a judge by kowtowing to the powers that be. It was not at all unusual for police captains to call a judge and tell him how to rule in a case."

Even though most judicial elections are nonpartisan, parties are often involved in providing contributions, organizational resources, and public visibility. For example, when the U.S. Supreme Court in 2002 overturned state laws that forbade candidates from voicing their positions on issues that could come before them, it was a party that filed the challenge *(Republican Party of Minnesota v. White)*.

By freeing candidates and supporters to comment on issues and to criticize their rivals, the *White* decision helped open the floodgates to increasing amounts of special interest money from such sources as trial lawyers, labor unions and businesses.

As a result of eased restrictions on rhetoric and growing special interest involvement, political parties no longer have to limit their activities or rhetoric. In the 2002 Illinois Supreme Court election, both Democratic and Republican parties spent about $4.2 million combined on campaign ads. In 2004, Georgia Democrats paid for campaign ads promoting the incumbent Supreme Court Justice Leah Sears for the first time in that state's nonpartisan election.

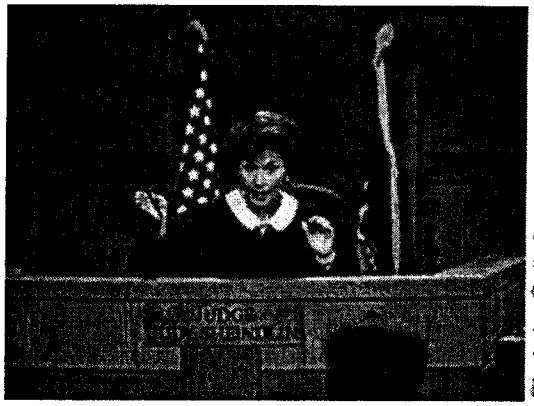

Photo by Getty Images

An even more dramatic change is the rising tide of interest groups' direct involvement, such as abortion rights opponents or supporters, business groups seeking more sympathetic court rulings or civil rights advocates.

For example, in the 2004 Illinois Supreme Court election, trial lawyers and labor groups formed the Justice for All Political Action Committee to attack Republican judge Lloyd Karmeier as soft on crime for granting probation to a defendant who later kidnapped and nearly beat to death a 92-year-old grandmother. In Mississippi, incumbent Justice James Graves won a runoff against a challenger supported by over $300,000 in advertising, mostly television, paid for by the Improve Mississippi Political Action Committee, a pro-business, tort reform organization.

In another example, the U.S. Chamber of Commerce has spent an estimated $50 million on

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judicial races since 1998, according to *Business Week* to limit tort judgments against businesses in state courts. Having learned that open support of pro-business candidates could backfire, the U.S. Chamber provides support through other organizations. It paid over $2 million to the state Republican Party—and another $250,000 to a tort-reform political committee—in 2004 to win a sympathetic Illinois Supreme Court seat.

As *Business Week* noted in 2004, "Increasingly, [special interest groups] have come to view the judiciary as something to be gamed and captured—just like Congress or the State House." Home Depot co-founder Bernard Marcus, who is active in the U.S. Chamber of Commerce, stated in that year, "We've declared war on judges who aren't doing their duty," driving home his point that he wanted to unseat judges who he did not consider to be pro-business.

For both interest groups and candidates, the chief means of campaigning for state Supreme Court seats has become television advertising—little used as recently as the 1990s. The contraction of reporting staffs by newspapers beset by circulation declines in recent years has limited print coverage of judicial elections.

Television news coverage is even more limited. As the Alliance for Better Campaigns found, "there is a near black-out of local public affairs" on the forty-five broadcast stations it studied in 2003. One study of the 2002 elections found that fifty-six percent of the local news broadcast on the top 122 stations nationwide had no campaign stories at all in the six weeks leading up to that year's mid-term elections—yet eighty-two percent had at least one campaign ad.

Ironically, courtroom shows such as *Judge Judy* and *Texas Justice* logged 20 times as many hours on these stations as local public affairs stories. (Note that "local public affairs" encompasses much more than judicial elections, or even local elections.)

Because there are so few other sources of any information about judicial candidates—and voting rates in judicial races are usually lower than in others like the state legislature—television advertising is the chief way that the public can learn about judicial candidates.

Campaign managers and candidates now appreciate this new reality. Television ads were used extensively in four-out-of-five states with contested elections in 2004, up from only one-in-four in 2000. Moreover, in the thirty-four races that featured such ads in 2004, the candidates who spent the most on television won twenty-nine of them.

Increasingly, these ads are hard-hitting and negative: one-in-five of all ads that ran in 2004, twice the rate of the previous election cycle, according to the Justice at Stake Campaign. West Virginia Supreme Court Justice Warren McGraw lost his re-election bid after a barrage of television ads accusing him of being soft on child molesters.

Ads in other states also featured candidates and their supporters implying how they would vote on issues that could come before their courts, a practice once considered unethical by many state judicial codes of conduct. A television ad supporting one Mississippi Supreme Court candidate praised him as a man "who believes the words 'In God We Trust' belong on the walls in every classroom," and who "will protect the sanctity of marriage between man and woman."

Next page: Ironically, courtroom shows such as Judge Judy logged 20 times as many hours on local television stations as public affairs stories, including coverage of judicial campaigns.

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Interest group ads can also feature state judicial candidate responses to the issues questionnaires they increasingly demand that candidates answer. For example, a corporate-backed group in Illinois asked all judicial candidates in the state about their positions on issues from class action suit rules to the constitutionality of punitive damages.

The Christian Coalition of Georgia asked Supreme Court candidates there about such issues as abortion, parental choice in education and "equal access for theology majors to a state-funded college scholarship program." It blasted candidates who refused to commit to how they would decide many future cases. Idaho's Christian Coalition pressed candidates to agree with the statement that "the United States Constitution is Christian-based" and to agree to display the Ten Commandments in their courtroom.

"Until a few years ago, judicial candidates could safely throw such nosy and coercive queries right into the round file" because of pre-*White* restrictions, wrote Burt Brandenburg, executive director of the Justice at Stake Campaign. "It hardly bears mentioning here that 'Refused to Respond' is the kiss of death from an interest group," he added.

"More and more, judicial candidates find themselves pressured to play by a new set of rules: take sides on controversial issues that may come before the courts, advertise your political commitments, lower your ethical standards—or an interest group will measure a black robe for someone else who will play that game," the Justice at Stake Campaign has concluded.

The pressure on high-stakes judicial candidates to fund television ad campaigns has vastly increased the need for contributions from special interests. "In a growing number of states, judicial races are evidencing an 'arms race mentality' of rising expenditures, heightened competition, and growing interest group activity," the Committee for Economic Development stated in 2002.

For example, the nine candidates for three Nevada Supreme Court seats in 2004 raised and spent a total of over $4 million, more than half of which was spent by the winners, according to the Progressive Leadership Alliance of Nevada. The average amount spent by those winners was up 73 percent from only two years earlier.

Candidates must tap traditional sources like lawyers and businesses—as well as nontraditional interest groups—as never before. The top three sources for candidates' campaigns in 2004 were business, lawyers, and political parties, according to the Institute on Money in State Politics. The Institute has not been able to compile similar data on contributions and spending by independent campaign organizations, but anecdotal evidence is that the sums contributed were high.

Noteworthy for 2004 was the doubling of contributions by business from two years earlier. "For the first time since the Institute's record keeping began in 1989, contributions from business donors outstripped contributions from lawyers," the Justice at Stake Campaign

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stated. This change reflects the aggressive new efforts by businesses and their organizations to revise tort liability laws and procedures, largely the province of state courts. Business contributions can also reflect unique state or local issues. For example, tort reform is the focus of the Illinois Civil Justice League, which began preparing for the 2006 elections over a year earlier. "The most important elections in Illinois in 2006 have nothing to do with the White House or the State House. They're all about the Court House," read one of its publications in 2005. In Nevada the gambling industry has accounted for a large share of contributions in judicial races there. The coal industry and the state regulations in West Virginia that govern its operations is another example.

It's a troubling trend. According to a poll of elected state judges in 2001 and 2002, forty-eight percent felt a "great deal" of pressure to raise money for elections. Asked how much influence contributions had on their decisions, four percent of the judges said "a great deal of influence," twenty-two percent said "some influence," and twenty percent said "just a little influence."

"Those statistics should scare anybody who has a case pending before these judges because the right answer is supposed to be 'no influence at all,' which garnered a mere 36 percent," *Business Week* opined, adding, "The moral in these states is clear: It pays to hire a lawyer who has donated to your judge's campaign." The heavy campaign spending of recent court elections creates "a perception that justice is for sale," stated Gorman Houston, a retired Alabama Supreme Court Justice.

Even the winner of the nation's most expensive court election, Illinois Supreme Court Justice Lloyd A. Karmeier, objected to how much his campaign cost, saying it was "obscene for a judicial race," and adding, "How can people have faith in the system?"

A year later, Justice Karmeier cast the decisive vote in a 4-2 majority to overturn a $10.1 billion judgment against the Phillip Morris tobacco company—after benefiting in 2004 from contributions of more than $1 million from the Illinois Civil Justice League, which filed a brief in support of the Phillip Morris appeal. Without Karmeier's vote, the appeal would have failed. His 2004 Democratic opponent received millions from plaintiff's attorneys opposed to the appeal.

"This is a good example of why both sides were so interested in this race," Cindy Canary of the Illinois Campaign for Political Reform told the *St. Louis Post-Dispatch*. Justice League spokesman Ed Murnane called it "terribly insulting" to imply that campaign contributions could sway a specific court decision, adding that "we supported him because he's a conservative."

With the "political battle zone" expanding into judicial elections, Business Week stated in 2004, "The political patronage that once existed in Mayor Richard J. Daley's Chicago is being replaced by a new form of interest-group patronage...One by one, many of the special unwritten traditions of civility and nonpartisanship that give the judiciary its moral authority is starting to erode."

Perhaps of even more fundamental concern is the increasing demand from special interest group for judicial candidates to declare their positions before they hear cases, which can jeopardize the right of litigants to a fair hearing. "When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave," wrote U.S. Supreme Court Justice Ruth Bader Ginsburg in her dissent in the *White* ruling.

A wide spectrum of the public has expressed concerns, as well. Nearly 71 percent of Americans—and over 90 percent of African Americans—polled by Zogby International believe that campaign contributions from interest groups have at least some influence on judges' decisions. Of note is that the poll was conducted nearly eight months before Election Day 2004.

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Reformers from bar associations to Corporation grantees such as the Brennan Center for Justice at New York University and the Committee for Economic Development—an independent, nonpartisan organization of business and education leaders dedicated to policy research on the major economic and social issues of our time, including campaign finance reform—are advocating significant reforms in the selection of judges.

Major reforms include:

■ Public Disclosure

Interest group "issue" ads used to support or defeat judicial candidates have been exempt from campaign finance disclosure rules in most states, but interest in changing that is growing. Disclosure would include who gave and how much and how the money was spent.

In 2003, Illinois adopted requirements for full disclosure and electronic submissions that enabled the public and media to read and understand who gave how much to both candidates and campaign committees. The electronic disclosure had an immediate benefit in the 2004 Supreme Court election by documenting timely data about the millions of dollars being spent for the open seat finally won by Justice Karmeier.

In 2004, Ohio adopted broad disclosure requirements to end the use of television ad campaigns funded anonymously. Although the system is yet untested in an election, according to the Justice at Stake Campaign, "The days of expensive court campaigns in Ohio are not banished to history, but voters will get much better information about who is bankrolling judicial candidates when they need it—during the heat of election campaigns."

■ Merit Selection and Retention Elections

Long favored by the American Bar Association, the American Judicature Society and others, this process would replace direct election of state judges, but also not rely solely on appointment by a governor and confirmation by the legislature. Although only several states use merit selection for all of their judges, about two-thirds of states use variations of this system, albeit limited to only a few judgeships. Called the "Missouri Plan," because that state adopted this system in 1940, it is a hybrid of both appointment and elections.

Such a system was proposed in 2005 to replace Pennsylvania's system of partisan elections for state judges. Backed by the Pennsylvanians for Modern Courts, allied with the Justice at Stake Campaign and other legal organizations, it would establish a bi-partisan, citizen-based nominating commission appointed by the governor and legislative leaders. The commission would screen candidates and compile a list of the most qualified, from which list the governor would fill a judicial vacancy. The judges would face voters every six or ten years, depending on the level of their court, in unopposed retention elections.

Voter approval has been an obstacle to amending state constitutions to establish or expand merit selection systems. Utah, in 1984, was the last state to approve such a system, which has failed to win approval in several state referenda since then. For example, in 1998,